

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)

SoundBite Communications, Inc.)

Petition for Declaratory Ruling)

CG Docket No. CG 02-278

REPLY COMMENTS OF TWILIO INC.

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Twilio Inc. (“Twilio”) submits these reply comments in response to the Federal Communications Commission’s Public Notice seeking comment on the Petition for Expedited Declaratory Ruling from SoundBite Communications, Inc. (“SoundBite”), which seeks a declaratory ruling that confirmatory, opt-out text messages do not violate the Telephone Consumer Protection Act (“TCPA”).

I. INTRODUCTION AND SUMMARY

The vast majority of commenters on SoundBite’s petition agree that confirmatory, opt-out text messages (also known as SMS) do not violate the TCPA, and in fact serve an important consumer-friendly objective. Indeed, interests like the Mobile Marketing Association, the Future of Privacy Forum, and the Retail Industry Leaders Association agree that consumers benefit when a confirmatory, opt-out text message is sent to a consumer that has requested no further messages be sent. And, they agree that such text messages do not violate the TCPA. This acknowledgement of the consumer’s request is sent with prior express consent, is not sent using an autodialer, and is consistent with the TCPA’s established grace periods for do-not-call requests. For all of these reasons, and because of the consumer benefit, the Commission should find that confirmatory, opt-out text messages do not violate the TCPA. Furthermore, clarifying this aspect of the TCPA will remove a barrier to consumer’s use of SMS because companies will no longer worry about plaintiffs’ lawyers initiating lawsuits over confirmatory, opt-out text messages and will encourage the productive use of SMS for consumers.

The Commission should not stop with SoundBite’s petition, however, but should address a number of other issues that are causing uncertainty for companies using SMS to provide consumers with innovative products and services. As Twilio pointed out in its comments, and as companies like GroupMe agree, there are issues about the meaning of

“autodialer” and “consent” under the TCPA that should be addressed by the Commission.¹ The Commission’s goal should be to protect consumers from unwanted text messages, but also to encourage new and innovative uses of SMS that benefit consumers.

II. CONFIRMATORY, OPT-OUT TEXT MESSAGES DO NOT VIOLATE THE TCPA

Twilio made three arguments that confirmatory, opt-out text messages do not violate the TCPA. Commenters agreed with each of point. First, Twilio demonstrated that the prior express consent a consumer provides when first agreeing to receive SMS alerts extends to the final confirmatory, opt-out text message. CTIA agreed because an opt-out request must be processed and the confirmatory, opt-out text message back to the consumer is sent with the prior express consent established by the initial consent to the SMS alerts and with the consent established by the opt-out request.² The consumer has an understanding and expectation that their opt-out request will be honored and an acknowledgement that it has been honored will be sent back. Without an acknowledgment, the consumer may feel their opt-out request has not been processed and they may worry about receiving additional text messages.

Second, Twilio showed that confirmatory, opt-out text messages are not sent using an “autodialer” and therefore allowed under the TCPA. Twilio encouraged the Commission to grant GroupMe’s pending petition that would clarify the meaning of autodialer and find that an ATDS must have the capacity, *at the time of use*, to autodial random or sequential numbers without human intervention and without first being altered through hardware

¹ GroupMe Comments at 1-2, *available at* <http://apps.fcc.gov/ecfs/document/view.action?id=7021914772> (last visited May 11, 2012).

² CTIA Comments at 5-6, *available at* <http://apps.fcc.gov/ecfs/document/view.action?id=7021914768> (last visited May 11, 2012).

or software changes.³ A broader interpretation of “autodialer” would essentially read the “autodialer” requirement out of the TCPA, because every single piece of telecommunications equipment could be considered an autodialer. Surely Congress did not mean to render the “autodialer” requirement surplusage and could not have meant to encompass any piece of telecommunications equipment.⁴ Verizon and Verizon Wireless agreed that an autodialer would not be in use when sending a confirmatory, opt-out text message because the equipment is sending a single message to a single recipient in reaction to a request from that number.⁵ In short, the targeted confirmatory, opt-out text messages at issue in SoundBite’s petition are not sent using an autodialer. The Commission should take this opportunity to clarify the meaning of autodialer. GroupMe’s proposed interpretation would protect consumers from random and unwanted spam SMS, while companies would not risk a TCPA lawsuit every time they sent a text message.

Finally, Twilio discussed the existing grace period that is allowed under the TCPA to process do-not-call requests and how confirmatory, opt-out text messages are consistent with that grace period. WMC Global agreed that confirmatory, opt-out text messages sent within minutes of the stop request are within the TCPA’s grace period for processing such requests and do not violate the TCPA.⁶ For all of these reasons and the sound public policy

³ *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling And Clarification at 10-11, CG Docket No. 02-278 (filed March 1, 2012) (“GroupMe Petition”).

⁴ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995) (one should avoid interpretations that render statutory terms as “surplusage”).

⁵ Verizon Comments at 9, available at <http://apps.fcc.gov/ecfs/document/view.action?id=7021914752> (last visited May 11, 2012).

⁶ WMC Global Comments at 2, available at <http://apps.fcc.gov/ecfs/document/view.action?id=7021914807> (last visited May 11, 2012).

behind providing consumers with certainty and feedback when they send a stop request, the Commission should find that confirmatory, opt-out text messages do not violate the TCPA.

The Commission should go further and resolve a number of other petitions related to SMS that would provide certainty to the industry and benefit consumers. Twilio pointed out that several petitions and a request for clarification remain unsettled by the Commission that would provide certainty to the industry. In addition to resolving GroupMe's petition, the Commission should take action on the petitions of Public Knowledge and Club Texting, as well as the request for guidance from USAC. *See* Twilio Comments at 9-11. Public Knowledge has asked the Commission to ensure that consumer's text messages cannot be blocked by wireless carriers based on the content of the message. Club Texting has asked the Commission to ensure that companies that facilitate SMS cannot be held liable for their customers' actions under the TCPA. Finally, USAC has sought Commission guidance on how to classify text message revenue, as telecommunications revenue or non-telecommunications revenue. The Commission should answer these questions.

III. CONCLUSION

In sum, Twilio strongly urges the Commission to grant SoundBite's Petition, as well as take action on the multiple other petitions and the request for guidance relating to text messages. The Commission should also ensure that consumers can receive text messages about whatever topic they wish by applying nondiscrimination principles to text messages and that SMS application developers cannot be held liable under the TCPA for actions taken by their customers.

Dated: May 15, 2012

Respectfully submitted,

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